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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALTON & SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JEROLD EDWARDS,
Respondent.

On Petition for a Writ of Certiorari to the
Appellate Court of Illinois, Fifth District

PETITION FOR A WRIT OF CERTIORARI

LESLIE G. OFFERGELD
Counsel of Record

THOMAS E. JONES
WALKER AND WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the Boiler Inspection Act, the applicability of which depends on whether the locomotive is "in use" on the railroad's line, applies to a locomotive located on a service and inspection track at the time of the railroad employee's injury.

2. In eight recent Federal Employers Liability Act cases, the Illinois Appellate Court, Fifth District, has either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside a jury determination of liability itself.

Whether, in this case, the Illinois Appellate Court, Fifth District, violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on (1) the applicability of the Boiler Inspection Act; (2) the violation of the Act; and (3) causation between the violation and the railroad employee's injury.

PARTIES BELOW

The parent companies of the Petitioner, Alton and Southern Railway Company, are the Southern Pacific Transportation Company and the Union Pacific Railroad Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
The Evidence	2
How The Federal Question Was Presented	6
Reasons For Granting The Writ	10
I. The Illinois Appellate Court, Fifth District's Application of the Boiler Inspection Act to a Locomotive Located on a Service and Inspection Track Conflicts with the Seventh and Tenth Circuits' Interpretation of the Act, and is Contrary to Congress' Intent.	10
II. This Case Presents a Timely and Unique Opportunity for the Court to Reassert its Command that the Statutory Right to Trial by Jury in Federal Employers Liability Act Cases shall be Preserved, as Congress Intended.	12

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act. 14

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act. 15

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' Injuries. 21

Conclusion 23

TABLE OF AUTHORITIES

Page(s)

Cases:

Chicago, M., St. P. & P. RR. Co. v. Linehan, 66 F.2d 373, 378 (8th Cir. 1933) 20

Estes v. Southern Pac. Transp. Co., 598 F.2d 1195 (10th Cir. 1979) 11

Goedel v. Norfolk & Western Ry. Co., 13 F.3d 807 (4th Cir. 1994) 16

Gregory v. Missouri Pac. R.R. Co., 32 F.3d 160, 162 n. 6 (5th Cir. 1994) 16

Harris v. Pennsylvania R. Co., 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959) 12

Hiles v. Norfolk and Western Ry. Co., 268 Ill.App.3d 561, 644 N.E.2d 508 (Ill.App. 1994) *rev'd* No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___ 10,13

Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946) 15

Leveck v. Consolidated Rail Corp., 148 Ill.App.3d 118, 498 N.E.2d 529, 535 (Ill.App. 1986) 18

Lilly v. Grand Trunk Western R.R. Co., 317 U.S. 481, 486, 63 S.Ct. 347, 87 L.Ed. 411 (1942) 16

Littlefield v. Alton & Southern R.R., 96 Ill.App.2d 470, 239 N.E.2d 147, 149 (Ill.App. 1968) 21

Luther v. Norfolk and Western Ry. Co., 272 Ill.App.3d 16, 649 N.E.2d 1000 (Ill.App. 1995) 13

Lyle v. Atchison, T. & S.F. Ry. Co., 177 F.2d 221, 223, (7th Cir. 1949) *cert. denied*, 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339 10,12

O'Ryan v. CSX Transp. Co., 255 Ill.App.3d 214, 626 N.E.2d 374 (Ill.App. 1993) *vacated* 155 Ill.2d 565, 630 N.E.2d 443 (Ill. 1994) 13

Penn v. Chicago & N.W. Ry. Co., 163 F.2d 995, 997 (7th Cir. 1947) 20

Pinkham v. Maine Central R.R. Co., 874 F.2d 875, 881 (1st Cir. 1989) 10

Pruett v. Norfolk and Western Ry. Co., 261 Ill.App.3d 29, 632 N.E.2d 652 (Ill.App. 1994) 13

Richardson v. Consolidated Rail Corp., 17 F.3d 213, 217 (7th Cir. 1994) 17,18

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) 12

Shepherd v. Missouri Pac. R.R. Co., No. 5-94-0479 (Ill.App. December 12, 1995) 13

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944) 15

Trinidad v. Southern Pac. Transp. Co. (5th Cir. 1991) 949 F.2d 187, 189 14

Uhrhan v. Union Pac. R.R. Co., 230 Ill.App.3d 725, 596 N.E.2d 221 (Ill.App. 1992) *rev'd* 155 Ill.2d 537, 617 N.E.2d 1182 (Ill. 1993) 13

Wilkerson v. McCarthy, 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497 (1949) 12

Wilson v. Missouri Pacific Railroad Company, No. 5-92-0615 (Ill.App. Sep. 15, 1994) *rev'd* No. 78028 (Ill. Jan. 18, 1996) 13

Statutes:

45 U.S.C. Sec. 23 (1976) 2,10,15

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OPINIONS BELOW

The order of the Illinois Supreme Court denying discretionary review (Appendix, *infra*, A-1) is not reported. The opinion of the Illinois Appellate Court, Fifth District, (Appendix, *infra*, A-2-A-33) is partially reported at 275 Ill.App.3d 529, 656 N.E.2d 208.

JURISDICTION

The order of the Illinois Supreme Court denying discretionary review of the judgment of the Illinois Appellate Court, Fifth District, was entered on January 31, 1996. The judgment of the Illinois Appellate Court was entered on October 3, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY PROVISION INVOLVED

The Boiler Inspection Act provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, it boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U.S.C. Section 23 (1976)

STATEMENT OF THE CASE

The Evidence

Respondent Jerold Edwards worked as a machinist for petitioner Alton & Southern Railway Company in East St. Louis, Illinois. (R420-421) His job was to inspect locomotives at the "pit" which is on E Track. (R426, 487, 488) Inspections, fueling, sanding and small repairs are done on locomotives at the pit. (R428, 488)

On July 15, 1987, four Union Pacific locomotives were on E Track to be inspected, checked for fuel and sand, and split up into two pairs. (R429, 497) The second and fourth units were to be coupled together and the first and third units were to be put together. (R429) According to his inspection report, Edwards inspected the four locomotives from 11:10 to 11:50 a.m. (R563-566; Def.Ex. 9) Edwards did not know whether the locomotives

had been checked for fuel and sand before his alleged accident. (R431, 509) The third and fourth units were separated from the second unit. (R443) While units three and four were being driven by the hostler to F Track, Edwards saw that the drawbar on unit two was six to eight inches towards him. (R450, 453, 546) He did not notice this when he inspected the locomotives initially. (R546)

Edwards did not know what caused the drawbar to come out of alignment. (R546) Because the position of the drawbar might cause a problem in coupling unit four to unit two, Edwards tried to straighten the drawbar. (R508)

Edwards placed one foot inside the rail and the other outside the rail and pushed on the drawbar. (R511) The drawbar did not move. (R511) Because he had not pushed the drawbar very hard the first time, he tried again and pushed harder. (R456, 512) This time, the drawbar "took off" and went beyond center. (R455, 512) When the drawbar moved, Edwards twisted around and fell backwards hitting his hand and shoulder on the rail. (R526-527) He ended up laying on the ground with his shoulders against the rail. (R528) He got up and pushed the drawbar back to center. (R514) This time, the drawbar moved freely. (R514) There were no witnesses to the alleged accident. (R515, 610)

Edwards testified this incident happened at about 11:00 a.m. (R460) In his accident report, plaintiff also listed 11:00 a.m. as the time of the accident. (Def.Ex. 2) According to his inspection report, however, Edwards had not begun inspecting the locomotives until 11:10 a.m., and was not finished with his inspection until 11:50 a.m. (R563-566; Def.Ex. 9)

After units four and two were coupled together, Edwards made the necessary connections between them, such as hooking up the air hoses. (R515-516) Edwards still had to disconnect unit two from unit one and then connect units one and three together. (R519, 520) However, he went to lunch at 12:00 before doing these two jobs. (R517, 520) At lunch, Edwards did not tell

anyone about the drawbar incident. (R460) At 12:20, Edwards went back to work. (R521) At 1:00, he made an accident report to Gary Stephens, the foreman. (R521, 522) Edwards did not remember what he did from the time he finished lunch until the time he filled out the accident report. (R521)

Edwards did not report the drawbar as defective. (R549) If he thought the drawbar was defective, Edwards would not have allowed the locomotive to go out on the road. (R449, 550) Edwards found the locomotive road-worthy. (R548-549)

Gary Stephens performed a mechanical inspection of the locomotive, including its drawbars. (R604) This inspection took place at 1:30 p.m. (R606) At that time, the locomotive was still on E Track. (R606) He found no defects during his inspection. (R608) For example, there were no cracks, broken pins, worn bushings or anything missing off of the equipment. (R613)

If they can be moved back to center, drawbars that stick or ones that have to be pushed hard manually are not required to be reported as defective. (R108-109, 593, 613) Nothing in Stephens' inspection indicated whether the drawbar had been sticking. (R613, 619)

Stephens had never been hurt moving a stuck drawbar. (R620) If he has to push a drawbar on E Track, Stephens gets good footing, tries to make a positive lift and scoot it over. (R620) If that does not work, he gets a fork lift or whatever equipment is needed. (R620) Dennis Korando, another locomotive foreman, testified that after the first attempt to move a drawbar fails, there are options available. (R150) One could use a long bar or a forklift with a chain. (R150) Also, two men can straighten a drawbar if the initial attempt by one man fails. (R117) Floyd Cooper, the Superintendent of the Transportation Department, testified a man should obtain assistance if he cannot move a drawbar with reasonable force. (R184, 191) A man should not

strain himself, but should get a second person to help if he cannot move the drawbar with reasonable force. (R192)

There were certain safety rules to be followed in moving drawbars. (R557) Rule 4070A provided that before adjusting drawbars, employees must ascertain that the coupler will move easily, and if not, the employee must obtain assistance. When adjusting the coupler, the employee must face the coupler and carefully follow the procedures set forth in Rule 4008A. (R554; Def.Ex. 7) Rule 4008A states lifting beyond normal capabilities is prohibited. If the employee is unable to lift the coupler, he should obtain the assistance of either another individual or a mechanical device. (R555; Def.Ex. 8)

When Edwards tried to move the drawbar the second time, he did not use unreasonable force. (R459-460) He did not hurt himself by lifting beyond his normal capacity, by using too much force pushing or lifting, or by straining. (R591)

After he reported the alleged accident, Edwards saw Dr. Byler. (R523) Edwards told Dr. Byler that he was pushing on a drawbar and felt sharp pain in the left neck area. (R675) He denied falling and he continued to work, but the pain progressed into his left shoulder area. (R675) On the second visit, Edwards told Dr. Byler he noticed a hernia on his left side. (R463)

Dr. Schoedinger saw Edwards on August 16, 1988. (R348) Edwards gave a history that as he was moving a coupler, his feet slipped and he fell, catching himself with his left hand. (R348) Initially, he had pain in the left side of his neck and left shoulder. (R348) A CAT scan and MRI ordered by Dr. Schoedinger revealed disc ruptures at C5-6 and C6-7. (R356, 357)

Since June 10, 1988, over a month before his alleged accident, Edwards had been treating with Dr. Stewart for pain in the left side of his neck and left shoulder. (R624, 626) Edwards had these complaints for two years. (R627, 629) Dr. Stewart felt Edwards' complaints of pain in his neck and shoulder were a chronic problem. (R630, 632)

How the Federal Questions Were Presented

Alton & Southern asserted its federal questions at every appropriate level of the Illinois court system.

Edwards dismissed all counts of his complaint, except the count brought under the Boiler Inspection Act. (R757, 829) At the trial court level, Alton & Southern moved for a directed verdict that the Act did not apply to the facts of the accident. (R757-758) The trial court denied Alton & Southern's motion and found as a matter of law that the Act did apply. (R776) Further, over Alton & Southern's objection, the trial court directed a verdict that Alton & Southern violated the Boiler Inspection Act, that the violation was a cause in fact of Edwards' injuries, and that Edwards' sustained damages. (R776, 830, 832, 855, 857-858) The trial court also directed a verdict against Alton & Southern on the defense of sole cause. (R836)

The jury received one verdict form which it returned assessing damages of One Million Four Hundred Fifty Four Thousand Dollars ($1,454,000). (R859, C573)

In the Illinois Appellate Court, Fifth District, Alton & Southern raised the federal questions in its appeal from the order of the trial court denying its motion for judgment notwithstanding the verdict, or in the alternative for a new trial. (C691) The first question is whether the Boiler Inspection Act, the applicability of which depends on whether the locomotive is "in use" on the railroad's line, applies to an employee performing work on a locomotive located on a service, inspection and maintenance track. The Illinois Appellate Court decided this question in the affirmative. The appellate court acknowledged that Edwards' duties included inspecting locomotives and preparing them for use in order to pull a train. However, it found that because Edwards' injury occurred while aligning a drawbar, which was after his inspection was complete and the locomotive was ready

for the crew, the locomotive was "in use" at the time of Edwards' accident, and the Boiler Inspection Act applied. (App., A-14, 15)

The second question is whether the Illinois Appellate Court, Fifth District, violated the litigants' statutory right to a jury trial under the Federal Employers Liability Act by preventing a jury decision on (1) the applicability of the Boiler Inspection Act; (2) the violation of the Act; and (3) causation between the violation and the railroad employee's injury.

As for the directed verdict on the applicability of the Act, the appellate court acknowledged there was an inconsistency between Edwards' accident report and trial testimony that his accident occurred at 11:00 a.m. after he had completed the inspection of the locomotives, and his inspection report which indicated that at 11:00 a.m., he had not even begun the inspection of the locomotives. The appellate court found Edwards' trial testimony that the accident occurred after the inspection was complete was much more important than his knowing the precise time of the accident. (App., A-14-15) It therefore held this inconsistency did not create a question of fact for a jury. (App., A-14-15)

The appellate court did not address some other facts relating to the locomotive's readiness for use at the time of the accident. After the alleged accident, the subject locomotive, unit two, had to be uncoupled from unit one and then coupled to unit four before it was ready for the Union Pacific crew to take out. (R515-516, 519, 520) At 1:30 p.m., two and one half hours after the alleged accident, the locomotive was still on the service and inspection track. (R606)

As for the directed verdict on the violation of the Boiler Inspection Act, the appellate court rejected Alton & Southern's contention that the evidence created a question of fact for a jury as to the credibility of the plaintiff's report of a stuck or misaligned drawbar. (App., A-17) It adhered to its previous

conclusion on the inconsistency between Edwards' inspection report and his trial testimony and accident report concerning what he was doing at the time of the alleged accident. (App., A-17)

The fact that the drawbar moved freely after the accident, that there was a normal post-occurrence inspection of the drawbar, and that Edwards certified the locomotive with the allegedly sticking drawbar as roadworthy were not factors affecting the credibility of Edwards' story of a stuck drawbar, in the appellate court's opinion. (App., A-19) The court stated it could not fault Edwards for not reporting the drawbar as defective because drawbars which stick due to lack of lubrication are not required to be reported by the FRA or by the Alton & Southern. (App., A-19)

The appellate court's opinion did not address Alton & Southern's other contentions which were 1) by Edwards' own description of the incident, the drawbar did not stick, he simply did not use the proper amount of force to move the drawbar on his first effort; and 2) assuming the drawbar was stuck, if Alton & Southern's safety rules on moving drawbars are followed, a stuck drawbar can be moved safely "without unnecessary peril to life or limb." (Appellant's brief, pp. 37-40)

The trial court directed a verdict on "cause in fact as a matter of law". (R892) It refused to instruct the jury that "The railroad denies that [Edwards'] alleged injuries and damages resulted, in whole or in part, from [Edwards] pushing a drawbar. (R895, 896) The trial court ruled the only issue for the jury to decide was the nature and extent of Edwards' damages, "not whether they happened pushing the drawbar or not." (R891-892) The Illinois Appellate Court also denied Alton & Southern's claims that the evidence raised questions of fact whether Edwards' injury was caused while he was trying to move the allegedly stuck drawbar. (App., A-21-22)

The appellate court did not address the following facts relating to the issue of causation. For over a month before the accident, Edwards had been treating with Dr. Stewart for chronic left-sided neck and shoulder complaints. (R624, 626, 630, 632) The day before the accident, Edwards saw Dr. Stewart for these complaints. (R653) Following the accident, the plaintiff had the same complaints. (R348, 675)

Alton & Southern's medical expert testified, in his opinion, the disc herniation in Edwards' neck was present before the accident. (R722-723)

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT'S APPLICATION OF THE BOILER INSPECTION ACT TO A LOCOMOTIVE LOCATED ON A SERVICE AND INSPECTION TRACK CONFLICTS WITH THE SEVENTH AND TENTH CIRCUIT'S INTERPRETATION OF THE ACT, AND IS CONTRARY TO CONGRESS' INTENT.

Recently, in *Hiles v. Norfolk and Western Ry. Co.*, 268 Ill.App.3d 561, 644 N.E.2d 508, *rev'd*, No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___, this Court granted certiorari to resolve a conflict between the decision of the Appellate Court of Illinois, Fifth District, and the decisions of the United States Courts of Appeal on whether a misaligned drawbar, absent evidence of defective coupling equipment, constitutes a violation of the Federal Safety Appliance Act, 45 U.S.C. 1, et.seq. This case represents a similar conflict concerning an important question of federal law which has not been, but should be, decided by this Court.

The Boiler Inspection Act (hereafter, "BIA") was not intended to apply to locomotives located on a service and inspection track which is where the locomotives are being prepared for use. The Act states, in relevant part, that: "[i]t shall be unlawful for any carrier *to use or permit to be used on its line* any locomotive . . . " (45 U.S.C. Sec. 23 (1976).) (Emphasis added) Locomotives being inspected, serviced or repaired at a maintenance facility are not "in use" within the meaning of the BIA. *Pinkham v. Maine Central R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) "[T]o service an engine while it is out of use, to put it in readiness for use, is the antitheses of using it." *Lyle v. Atchison, T. & S.F. Ry. Co.*, 177 F.2d 221, 223, (7th Cir. 1949) *cert. denied*, 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339

In *Lyle*, the plaintiff's job duties were to service locomotives and put them in readiness for use on the railroad. After he had completed servicing a locomotive at the inspection pit, the plaintiff fell off the steps of the locomotive injuring himself. The

court held the locomotive was not in use at the time of the accident so as to bring it within the purview of the BIA. It found the BIA did not apply in favor of one who puts an engine in readiness for use. *Lyle*, 177 F.2d at 222-223

Also, in *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195 (10th Cir. 1979), a hostler was injured while opening the cab door of an engine in preparation for moving the engine from a service track to an unknown location. The court held the engine was not in use on the railroad's line for purposes of the BIA. *Id.* at 1198-1199

Similarly, here, the Union Pacific locomotives were taken out of service and given to Alton & Southern to be inspected, serviced and split into two pairs. Edwards' job duties were to inspect the locomotives and help prepare them to be used later in pulling a train. According to Edwards' trial testimony, he inspected the drawbar on the second locomotive to determine if it was in line to couple with another locomotive. At the time of his injury, Edwards was preparing the second locomotive for use by aligning the drawbar so that locomotive could couple with another. Since at the time of his alleged injury, Edwards was putting the locomotive in readiness for use, the locomotive was not "in use" within the meaning of the BIA.

The Appellate Court of Illinois found that because Edwards' injury occurred while aligning a drawbar, which was after his inspection was complete and the locomotive was ready for the crew, the locomotive was "in use" at the time of the accident. (App., A-14) There were disputed questions of fact whether Edwards' inspection was complete or not, as discussed in the next section. Nevertheless, the locomotive clearly was not ready for the Union Pacific crew. It was undisputed that part of Edwards' job of getting the locomotives ready for the Union Pacific crew was to split the four locomotives up into two pairs which was what was taking place at time of the accident. (R429, 497)

In *Lyle* and *Estes*, as in this case, the locomotive was located on a track devoted primarily to maintenance, inspection and repair activities, and all the locomotives had been turned over to the service and inspection crew when the plaintiffs' respective accidents occurred. To impose the mandatory duty to have locomotives in safe condition while in use in favor of one who puts locomotives in readiness for use is contrary to the intent of Congress in enacting the BIA. *Lyle*, 177 F.2d at 222-23

Accordingly, this Court should grant Alton & Southern's petition to resolve the conflict between the Appellate Court of Illinois, Fifth District, and the Seventh and Tenth Circuits, and to correct the Appellate Court of Illinois' error.

II. THIS CASE PRESENTS A TIMELY AND UNIQUE OPPORTUNITY FOR THE COURT TO REASSERT ITS COMMAND THAT THE STATUTORY RIGHT TO TRIAL BY JURY IN FELA CASES SHALL BE PRESERVED, AS CONGRESS INTENDED.

Prior to 1969, this Court consistently granted certiorari in cases arising under the Federal Employers Liability Act (FELA) and its maritime companion, the Jones Act, on the ground that the lower courts were persistently depriving the litigants of their right to a jury determination of liability, thus frustrating Congress' intent to vest the power of decision in these actions in the jury. See, *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed. 2d 1 (1959); *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) Since 1969, however, certiorari has not been granted in any FELA case to review the evidence to ensure that the litigants' statutory right to a jury trial has been respected. The failure to grant certiorari in recent terms in these type of cases cannot reflect that this Court is no longer committed to preserving the statutory right to jury trial as Congress intended. It must be that no lower court judgment has attracted the Court's attention to the issue.

In a series of recent FELA cases, this one being a prime example, the Appellate Court of Illinois, Fifth District, has persistently either affirmed a lower court's decision to withhold a liability issue from the jury, or set aside the jury's determination of liability itself. See, *Shepherd v. Missouri Pac. R.R. Co.*, No. 5-94-0479 (Ill.App. December 12, 1995) (directed verdict in favor of the plaintiff on liability affirmed); *Luther v. Norfolk and Western Ry. Co.*, 272 Ill.App.3d 16, 649 N.E.2d 1000 (Ill.App. 1995) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *Hiles v. Norfolk and Western Ry. Co.*, 268 Ill.App.3d 561, 644 N.E.2d 508 (Ill.App. 1994) (directed verdict in favor of the plaintiff on liability affirmed) *rev'd* No. 95-6 (U.S. Feb. 27, 1996), ___ U.S. ___, 116 S.Ct. 890, ___ L.Ed.2d ___; *Pruett v. Norfolk and Western Ry. Co.*, 261 Ill.App.3d 29, 632 N.E.2d 652 (Ill.App. 1994) (directed verdict in favor of the plaintiff on contributory negligence affirmed); *O'Ryan v. CSX Transp. Co.*, 255 Ill.App.3d 214, 626 N.E.2d 374 (Ill.App. 1993) (set aside jury verdict on contributory negligence of the plaintiff) *vacated* 155 Ill.2d 565, 630 N.E.2d 443 (Ill. 1994); *Wilson v. Missouri Pacific Railroad Company*, No. 5-92-0615 (Ill.App. Sep. 15, 1994) (set aside jury verdict on contributory negligence of the plaintiff) *rev'd* No. 78028 (Ill. Jan. 18, 1996); *Uhrhan v. Union Pac. R.R. Co.*, 230 Ill.App.3d 725, 596 N.E.2d 221 (Ill.App. 1992) (set aside jury verdict on plaintiff's contributory negligence) *rev'd* 155 Ill.2d 537, 617 N.E.2d 1182 (Ill. 1993)

In this case, the Appellate Court of Illinois, Fifth District, affirmed the circuit court's decision to prevent a jury finding on every liability issue in the case. It upheld a directed verdict on (1) the applicability of the BIA, a violation of which gives rise to an action for damages under the FELA; (2) the violation of the BIA; and (3) causation between the violation of the BIA and Edwards' alleged injury. This Court must exercise its power to review the evidence in this case and compel the Illinois Appellate Court, Fifth District, to respect FELA litigants' statutory

right to trial by jury. It is also vital for this Court to reassert its commitment to the statutory right to decision by jury in FELA cases in order that other lower courts honor Congress' intent.

A. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Applicability of the Boiler Inspection Act.

The Illinois Appellate Court acknowledges an inconsistency between Edwards' testimony at trial that the accident happened after he had completed his inspection of the locomotives, and his inspection and accident reports which indicate the accident occurred before Edwards even began his inspection. If Edwards was injured before the locomotives were inspected, the BIA would not have applied. *See, Trinidad v. Southern Pac. Transp. Co.* (5th Cir. 1991) 949 F.2d 187, 189 (Locomotive not in use where it had not yet passed inspection at time of accident.)

Edwards testified he had completed his inspection of all four locomotives by the time of the alleged accident. Edwards' inspection report documents that he was inspecting the locomotives from 11:10 a.m. until 11:50 a.m. (Def.Ex.9) His accident report states the accident occurred at 11:00 a.m., which was before he began inspecting the locomotives at 11:10 a.m. (Def.Ex.2) These two reports made by the plaintiff on the day of the accident are patently inconsistent with the plaintiff's trial testimony that his accident occurred after he had inspected the locomotives.

In addressing this inconsistency, the Illinois Appellate Court makes its own determination that Edwards' trial testimony that his inspection was complete at the time of the accident was "more important" than the reports made by Edwards on the day of the accident which contradict that testimony. (App., A-14-15) In making this determination, the Appellate Court of Illinois, Fifth District, shows its inability to respect the decisions of this Court. Those decisions mandate that in Federal Employers Lia-

bility Act cases, courts are not free to take the decision away from the jury because judges feel that certain results or conclusions are the most reasonable. *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 88 L.Ed. 520 (1944) An issue may not be taken from the jury unless there is a complete absence of probative facts to support contrary conclusions. *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946)

It was a question for the jury, not the appellate court, whether the reports made by Edwards on the day of the accident were more or less "important" than Edwards' trial testimony. If the jury believed the reports Edwards prepared on the day of the accident were more credible than his trial testimony, then it would have found the locomotive was out of service at the time of the accident.

There were other factual disputes relating to the question of whether the locomotive was "in use" at the time of the injury. Edwards reported the accident at 1:00 p.m. (R521, 522) He said the accident took place at 11:00 a.m. (Def.Ex. 2) Gary Stephens performed his inspection of the locomotive at 1:30 p.m. (R606) At 1:30 p.m., two and one-half hours after the accident, the locomotive was still on the service and inspection track. (R606) Also, on cross-examination, Edwards admitted the locomotive was not ready for use at the time of the accident because he still had to connect the locomotive, unit two, to unit four, and then disconnect unit two from unit one. (R515-516, 519, 520)

B. The Illinois Appellate Court Improperly Prevented a Jury Decision on the Violation of the Boiler Inspection Act.

A piece of equipment meets the requirements of the Boiler Inspection Act if it is "in proper condition and safe to operate . . . *without unnecessary peril to life or limb* . . . " (45 U.S.C. 23) (Emphasis added) Whether a particular condition presents an "unnecessary peril to life or limb" is an issue of fact for the jury.

Gregory v. Missouri Pac. R.R. Co., 32 F.3d 160, 162 n. 6 (5th Cir. 1994); *Lilly v. Grand Trunk Western R.R. Co.*, 317 U.S. 481, 486, 63 S.Ct. 347, 87 L.Ed. 411 (1942)

In preventing a jury decision on whether the allegedly stuck drawbar was safe to operate without unnecessary peril to life or limb, the Illinois Appellate Court only cites to the isolated concessions of a locomotive foreman and a claims agent that a person may get hurt pushing on a stuck drawbar. These concessions were not unrebutted. As qualified by the claims agent, Evelyn Pulley, people can get hurt doing most anything. (R313)[1] Ms. Pulley also testified that if a person adjusts a drawbar safely and the way he is taught, he would not be injured. (R323) Not everyone is hurt moving a stuck drawbar. (R620) If proper procedures are followed, a person would not get hurt adjusting a stuck drawbar. (R182, 184, 620) A stuck drawbar would not be classified as a hazard by the Superintendent of the railroad. (R182) While they have to be adjusted, there are safe ways of doing it. (R184) Even the Federal Railroad Administration has determined that drawbars which stick for reasons other than defects in the coupling equipment, which was allegedly the case here, do not have to be repaired or reported. (R613-614) Viewing the evidence in a light and with all reasonable inferences most favorable to Alton & Southern, the question of whether an allegedly stuck drawbar is safe to operate without unnecessary peril to life or limb was one of fact for the jury, not the appellate court, to decide.

Indeed, in *Goedel v. Norfolk & Western Ry. Co.*, 13 F.3d 807 (4th Cir. 1994), a temporarily "frozen" drawbar was held not to be evidence of a defect in the coupling equipment, and consequently not in violation of the Federal Safety Appliance Act, 45 U.S.C. Sec. 2. *Id.* at 811-812 In this case, assuming the BIA

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[1] In reciting Ms. Pulley's testimony on page 313 of the record, the appellate court omits Ms. Pulley's entire answer that "Well, that is a fact of life. Certain people are going to be injured no matter what." (R313)

applies, Alton & Southern is asking for a jury determination as to whether a temporarily "stuck" drawbar is in violation of the BIA.

Again, erroneously viewing the evidence and inferences therefrom in the light most favorable to Edwards, the Illinois Appellate Court concludes there was no evidence which could have caused a jury to disbelieve Edwards' claim there was ever a stuck drawbar in the first place. The appellate court ignores both the evidence and the law in making its conclusion.

First, there is the plain inconsistency between Edwards' trial testimony that he was injured aligning a drawbar after he inspected the locomotives, and the reports he prepared on the day of the accident which indicated he was injured before he inspected the locomotives while their drawbars were still connected together. If the jury believed the reports were accurate, then it had to conclude Edwards was lying when he testified he was injured while moving a drawbar.

The evidence also established that drawbars are made to move laterally to negotiate curves. (R206) It is when going around curves that drawbars have a tendency to come out of alignment. (R206) In this case, Edwards did not see the drawbar out of alignment during his inspection. This is evidence the drawbar on unit two was not out of alignment while unit two was coupled to unit three. The locomotives were uncoupled on a straight, not a curved, track. Therefore, during uncoupling, there could not have been any lateral movement of the drawbar on unit two to cause it to come out of alignment. The absence of lateral movement which could have caused the drawbar to become misaligned affected the veracity of Edwards' claim that the drawbar was misaligned.

A normal post-occurrence inspection of equipment is probative evidence contradicting a plaintiff's testimony that the equipment did not function properly. *Richardson v. Consolidated Rail*

Corp., 17 F.3d 213, 217 (7th Cir. 1994); *Leveck v. Consolidated Rail Corp.*, 148 Ill.App.3d 118, 498 N.E.2d 529, 535 (Ill.App. 1986) Here, on a detailed inspection of the drawbar following the accident, no defects were found in the equipment that might have caused the drawbar to stick. Drawbars usually stick because they are bent. (R107) They can also stick because of a worn carrier plate. (R237) Stephens' inspection of the subject drawbar after the accident revealed neither of these conditions.

However, the appellate court finds the most important aspect of Stephens' testimony is that the inspection would not have shown if the drawbar stuck because of lack of lubrication. (App., A-19) From this concession, the appellate court concludes as a matter of law that the drawbar must have stuck because of inadequate lubrication. But, Stephens' inspection did not confirm the drawbar stuck because of inadequate lubrication. He did confirm it did not stick because of the most common cause of being bent. Furthermore, Edwards testified the drawbar moved freely following the accident, and he declared the locomotive it was attached to as "road-worthy." Viewing the evidence and inferences therefrom in a light most favorable to Alton & Southern, whether the drawbar stuck because of a lack of lubrication, or whether it did not stick at all as suggested by Stephens' inspection and the fact it moved freely after the alleged incident, was a question of fact for the jury, not the appellate court.

This case is comparable to *Richardson*. There, the plaintiff claimed he was injured because of a malfunctioning handbrake. He appealed from a judgment entered on a jury verdict in favor of the railroad under the Boiler Inspection and Safety Appliance Acts. The plaintiff contended the trial court erred when it admitted into evidence testimony and inspection records indicating the handbrake worked normally before and after the accident. The court concluded this evidence was relevant because it

tends to show, contrary to the plaintiff's testimony, that no improper or unsafe operation occurred. It noted the plaintiff bore the burden of proving the handbrake was not working efficiently when he was injured, and that his testimony was not conclusive. Because the railroad disputed whether the brake malfunctioned, it was allowed to present evidence of the brake's condition at times other than the incident in order to challenge plaintiff's allegations. It was then up to the jury to make decisions of credibility and weigh the evidence in deciding whether plaintiff met his burden in proving that the brake did not work efficiently at the time of the incident. 17 F.3d 213, 217

Further, Stephens' normal inspection and Edwards' own description of the details surrounding his efforts to move the drawbar suggest the drawbar was never stuck in the first place. Edwards testified after his first attempt to move the drawbar, he did not seek assistance because he "didn't push that hard on it the first time." (R456) The second time, when he pushed the drawbar harder, it moved freely. (R512) However, Edwards did not have to use too much force or to strain the move the drawbar the second time. (R459-460, 591) Viewing this testimony in the light most favorable to Alton & Southern, the jury could have determined the drawbar was not stuck. Rather, Edwards did not make a proper effort to move the drawbar the first time. When he applied reasonable, but sufficient force, on the second effort, the drawbar moved properly. A drawbar which can be aligned with the application of reasonable force is one which is in proper condition and safe to operate without unnecessary peril to life or limb.

Edwards' testimony that he made one unsuccessful effort to move the drawbar was not conclusive proof that the drawbar was stuck. The inferences from the evidence in this case are similar to those in cases involving proof of unsuccessful efforts to uncouple railroad cars. In such cases, proof that the plaintiff made unsuccessful efforts to operate the coupler is only sufficient to raise a jury question as to whether the coupler met the

requirements of the Safety Appliance Act. See, *Penn v. Chicago & N.W. Ry. Co.*, 163 F.2d 995, 997 (7th Cir. 1947) As stated in *Chicago, M., St. P. & P. RR. Co. v. Linehan*, 66 F.2d 373, 378 (8th Cir. 1933):

> " The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition?"

Because there was a disputed question of fact as to whether there was ever a stuck drawbar, this question should have been submitted to the jury.

The appellate court, again ignoring the evidence most favorable to Alton & Southern, determines Edwards' claim he suffered a hernia moving the drawbar was not suspect. Edwards' counsel cross-examined Alton & Southern's Superintendent as follows:

> "Q. I understand; and if you go down there and move them [drawbars] and you push them over like this then they're not defective. If you have got to push real hard then maybe you may cause one of your working people to get a hernia. Hernias aren't good, are they?" (R213)

Yet, Edwards himself testified he did not use too much force pushing or lifting the drawbar, and did not hurt himself straining. (R591) On his accident report, the only injuries plaintiff listed were to his neck and shoulder. Although the accident happened on a Friday, Edwards had no complaints associated with a hernia until Monday, three days after the alleged accident. (R463, 680) These additional facts ignored by the appellate court and viewed most favorable to Alton & Southern affected the credibility of Edwards' claim he suffered a hernia moving the drawbar.

In summary, Alton & Southern was deprived of its statutory right to a jury trial on whether the drawbar was involved in the accident and whether it failed to operate.

C. The Illinois Appellate Court Improperly Prevented a Jury Decision on Causation Between the Alleged Violation of the Boiler Inspection Act and Edwards' injuries.

The Illinois Appellate Court finds the trial court properly withheld from the jury the question of causation, i.e., whether Edwards' alleged injuries were caused, in whole or in part, by Alton & Southern's alleged violation of the BIA. (App., A-21-22) Whether an alleged injury resulted from the violation of the BIA is for the jury. *Littlefield v. Alton & Southern R.R.*, 96 Ill.App.2d 470, 239 N.E.2d 147, 149 (Ill.App. 1968)

Here, there was evidence from which the jury could have believed that the alleged drawbar incident was not a cause, in whole or in part, of Edwards' alleged injuries. For two years before the July 15, 1988 accident, Edwards had the same complaints he had on the date of the accident. These complaints concerned the left neck and shoulder areas. Indeed, the day before the accident, Edwards underwent chiropractic treatment by Dr. Stewart for these complaints. Dr. Stewart considered these complaints as a chronic condition. Based on this testimony, an issue of fact was raised whether Edwards' complaints and examination findings on July 15, 1988 were merely a continuation of his pre-existing condition unrelated to the accident on July 15, 1988.

Furthermore, there was evidence and inferences therefrom that the herniated discs discovered by Dr. Schoedinger after the accident were present before July 15, 1988. This was the very conclusion reached by Alton & Southern's medical expert, Dr. Hogan. (R722-723) Dr. Hogan noted that before July 15, 1988, Dr. Stewart diagnosed nerve injury at the levels of C5-6 and C6-7 which were the same levels Dr. Schoedinger performed surgery on. (R750) Further, Dr. Hogan understood from reviewing Dr. Stewart's records that Edwards had radicular complaints from his neck into the shoulder. (R750-751, 754-755) Part of Dr.

Stewart's diagnosis was cervical-brachial neuralgia causing neck, shoulder and arm pain. (R651) These are the same complaints Edwards reported to Dr. Schoedinger in August, 1988. (R349) Those complaints are compatible with disc herniation at the levels Dr. Schoedinger operated on. (R752)

Dr. Stewart admitted that without a CAT scan or an MRI, he could not say with any real certainty that Edwards did not have a disc injury before July 15, 1988. (R670) Edwards did not tell Dr. Byler, Dr. Schoedinger or Dr. Hogan that he had neck and shoulder complaints before the date of the accident. This omission could have caused the jury to believe Edwards was hiding something from his doctors which was detrimental to his case. Dr. Schoedinger testified the accuracy of his opinion as to causation depends on the accuracy of Edwards' history of when his symptoms actually began. (R396)

As for the hernia, at trial, Edwards testified that on July 15, 1988, he did not lift beyond his normal capacity, did not hurt himself using too much force pushing or lifting, and did not hurt himself straining. The only injuries he listed on the accident report were to his neck and shoulder. He reported no complaints associated with a hernia until three days after the accident. Finally, no doctor testified the hernia was caused by the alleged drawbar incident. These factors were sufficient to raise a question of fact whether the hernia was caused by the accident on July 15, 1988.

In summary, the Appellate Court of Illinois, Fifth District, deprived the litigants in this case of their statutory right to trial by jury on the issues of (1) the applicability of the BIA; (2) the violation of the BIA; and (3) causation between the violation of the BIA and Edwards' injuries. This case presents a timely and unique opportunity for the Court to reassert its command that the statutory right to trial by jury in FELA cases shall be respected, as Congress intended.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

WALKER AND WILLIAMS, P.C.

LESLIE G. OFFERGELD*
THOMAS E. JONES
4343 West Main Street
Belleville, Illinois 62223
618/277-1000

Counsel for Petitioner,
Alton and Southern Railway Company

*Counsel of Record

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